IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-529

MONTANA POWER COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

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and Nos. 76-585, 76-594, 76-619, 76-603, 76-620

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR INTERVENOR RESPONDENTS IN OPPOSITION

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No. 76-529

MONTANA POWER COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
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No. 76-619

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Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

No. 76-603

ALABAMA POWER COMPANY, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR INTERVENOR RESPONDENTS IN OPPOSITION [1]

OPINION BELOW

The opinion of the court of appeals has been officially reported at 540 F.2d 1114. It is set out as an appendix to several of the Petitions for Writs of Certiorari.[2]

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1976. Petition, No. 76-529, App. C. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the requirement of the Clean Air Act that the clean air resources of the Nation be protected from significant deterioration should be reconsidered by this Court when it has been twice determined by the Court of Appeals for the District of Columbia Circuit, has received judicial approval from several other courts of appeals, has been ratified by the Congress, and is fully supported by the Act and by its legislative history.

2. Whether the Clean Air Act, in its prohibition against the significant deterioration of existing air quality, or the regulations promulgated to carry out the Act violate any constitutional prohibition.

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[1] The intervenor respondents are the Sierra Club, the Oregon Environmental Council, Susan L. Moore, Sally Rodgers, Stephen Winter, and John Tanton.

[2] References to the court of appeals opinion and judgment will hereafter be made to the appendix to the petition in No. 76-529.

3. Whether the regulations are arbitrary and capricious because the pollution increments established by them are not directly related to specific adverse effects or because there are not sufficient data and modeling techniques to make them workable.

4. Whether the regulations, insofar as they allow federal agencies managing federal lands to designate these areas in such a manner as to allow less degradation of air quality, are arbitrary and capricious.

5. Whether the procedures followed by the Environmental Protection Agency in promulgating the regulations to prevent significant deterioration of air quality were in conformity with the Clean Air Act.

STATUTE AND REGULATIONS INVOLVED

Excerpts from the Clean Air Act, 42 U.S.C. 1857, *et seq.*, are set out in the Petition, No. 76-529, Appendix E. The regulations, 40 C.F.R. 52.01(d), (f) and 52.21, are also set out in that Petition, Appendix B.

STATEMENT

Respondents adopt the Statement set out in the Petition for a Writ of Certiorari, No. 76-617, *Sierra Club, et al.* v. *Environmental Protection Agency, et al.*

ARGUMENT

1. The industry petitioners seek to have this Court determine that the Clean Air Act of 1970 does not authorize the Environmental Protection Agency to prevent significant deterioration of air quality. In short, they seek the overturn of *Sierra Club* v. *Ruckelshaus*, 344 F.Supp. 253 (D.D.C. 1972), affirmed per curiam, 4 ERC 1815, affirmed by an equally divided Court *sub nom.*

Fri v. *Sierra Club*, 412 U.S. 541 (1973). This determination was reaffirmed by the court below.[3] We submit that the decisions were correct and need not be reviewed by this Court.

As the court of appeals noted Petition, No. 76-529, pp. 17a-18a) the policy of preventing significant deterioration was part of the clean air statute even before 1970. The National Air Pollution Control Administration, the predecessor of EPA, adopted Guidelines for the Development of Air Quality Standards and Implementation Plans in 1969 that stated (Section 1.51):

> [A]n explicit purpose of the Act is "to protect and enhance the quality of the Nation's air resources." Air quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portion of an air region clearly would conflict with this expressed purpose of the law.

During the hearings on the 1970 amendments, Undersecretary Veneman of HEW (which then enforced the 1967 statute) presented Secretary Finch's statement to both Houses:[4]

> [O]ne of the express purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources." Accordingly it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with this provision of the Act. We shall continue to ex-

[3] The two decisions of the court of appeals were unanimous. The judges who participated were McGowan, Robb, Danaher, Wright, Robinson, and Wilkey.

[4] Hearings on Air Pollution before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 91st Cong., 2d Sess. 132-133 (1970); Hearings on Air Pollution Control and Solid Waste Recycling before the Subcommittee on Public Health and Welfare of the House Interstate and Foreign Commerce Committee, 91st Cong., 2d Sess. 297 (1970).

> pect states to maintain air of good quality where it now exists.

After presenting this statement to the Senate Committee, Undersecretary Veneman expanded upon it, adding:[5]

> We do not intend to condone "backsliding." If an area has air quality which is better than the national standards, they would be required to stay there and not pollute the air even further, even though they may be below national standards.

The Undersecretary then was asked by Senator Cooper:[6]

> I notice some place in your statement * * * you said that if a region or an area had a certain air quality which might be higher than other areas of the country, that that would be maintained. It could not be degraded; is that correct?
>
> Mr. Veneman. Yes. We pointed out we did not want deterioration of the air in those areas that may be below what the standard is at the present time.

During the House hearings on the 1970 legislation, a witness for the chemical industry urged the committee to modify the provisions which he described as an unqualified prohibition of degradation.[7] In response, Congressman Rogers stated:[8]

> If we pursue that philosophy where we say we are not going to do anything in the clean area where we know it will contribute to the environment then we simply set the stage for allowing that area to be polluted up to the point where we have to come in in a drastic way later, whereas if we start with

[5] Senate Hearings, *supra*, p. 143.

[6] *Id.* at 159.

[7] House Hearings, *supra*, p. 465.

[8] *Id.* at 475.

> any clean air areas and try to keep them clean then we don't have to go back like we are thinking of doing now * * *.

The Senate Report on the 1970 amendments made clear that no state implementation plan permitting significant deterioration of air quality should be approved:[9]

> In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative. Given the various alternative means of preventing and controlling air pollution—including the use of the best available control technology, industrial processes, and operating practices—and care in the selection of sites for new sources, land use planning and traffic controls—deterioration need not occur.

As a result, after Congress in 1970 readopted the language of the 1967 Act (Section 101(b)), EPA adopted National Primary and Secondary Ambient Air Quality Standards which provide (40 C.F.R. 50.2(c)):

> The promulgation of national primary and secondary air quality standards shall not be considered in any manner to allow significant deterioration of existing air quality in any portion of any State.

The chief sponsor of the 1970 amendments, Senator Muskie declared in opening the 1973 hearings to review the implementation of that policy:[10]

[9] S. Rep. No. 1196, 91st Cong., 2d Sess. 11 (1970).

[10] Nondegradation Policy of the Clean Air Act, Hearings before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 93d Cong., 1st Sess. 1 (1973).

> [T]he policy of nondegradation * * * was incorporated into the 1967 Air Quality Act. It was not altered in the 1970 clean air amendments. The Environmental Protection Agency's predecessor for air pollution, the National Air Pollution Control Administration defined this policy in guidelines in 1969. EPA initially proposed a nondegradation policy in guidelines for air quality implementation plans in 1971. Subsequently, EPA deleted this policy from those guidelines and a court challenge ensued. The courts have upheld the intent of the act. Nondegradation is national policy.

In the most recent session of Congress, amendments to the Clean Air Act were proposed and extensively debated. Although there were some differences between the House and Senate versions, both of which passed the respective bodies by substantial margins, each preserved the nondegradation policy in a form much like the EPA regulations.[11] The report accompanying the House measure stated:[12]

> The Committee has developed this section to provide clearer definition of the nearly decade-old policy (reflected in section 101(b) of the Act) that significant deterioration of clean air must be avoided * * *.

The report then carefully chronicled the enactment and implementation of the policy. It noted that EPA's 1971 adoption of guidelines for implementation plans which would have permited degradation of air quality to the level of the national standards constituted a "sudden

[11] The Senate bill, S.3219, passed by a vote of 78 to 13. The House bill, H.R. 10498, was approved by a vote of 324 to 68. The conference bill failed to be considered because of a filibuster on the last day of the Congress by four Senators which prevented it from coming to the floor before the previously agreed upon adjournment date. 122 Cong. Rec. S17574 (daily ed. Oct. 1, 1976).

[12] H. Rep. No. 1175, 94th Cong., 2d Sess. 83 (1976).

reversal of a policy previously recognized by the Administration and by the Congress since 1967 * * *." *Id.* at 84.

The Senate report was equally firm:[13]

> A nondegradation policy was articulated first in Federal water pollution law. That was in 1965. The concept was incorporated into the 1967 Air Quality Act, which stated that a basic purpose of the Act was to "protect and enhance the quality of the Nation's air resources." That language was not altered by the 1970 Clean Air Amendments. This bill clarifies and details that policy.

The report then quoted from the 1970 Senate report which it said, "identified the tools necessary to implement a policy to prevent significant deterioration." *Ibid.* The 1976 report further cited the guidelines of the National Air Pollution Control Administration, which defined the policy and EPA's original standards which similarly carried it out. *Ibid.*

These statements put to rest the claims raised by industry petitioners that the Clean Air Act does not authorize the prevention of significant deterioration. Even Congressional opponents of the 1976 amendments, which would have enacted into the statute a regulatory structure substantially like, and in some ways identical to, the EPA regulations, generally did not deny the existence of the basic policy.[14] Senator Moss, who sought to

[13] S. Rep. No. 717, 94th Cong., 2d Sess. 20 (1976).

[14] The petition in No. 76-529 cites (Pet. 21, note 13) several statements by opponents of the 1976 bill who declared that such a policy had not been intended by the Congress in 1970. Five of those cited were not members of Congress in 1970 and therefore are not in a position to say what was intended.

In any event, this Court has repeatedly pointed out that it is to the sponsors of legislation, not to the opponents, to which one must look for the "authoritative guide to the construction of legislation." ***Schegmann Bros.*** v. ***Calvert Distillers Corp.***, 341 U.S. 384, 394-395

amend the bill to provide merely for a one-year study of nondegradation, nonetheless expressly affirmed the policy's existence and would have left in place the current EPA regulations pending later Congressional action. 122 Cong. Rec. 6667 (daily ed. May 6, 1976).

As the court of appeals stated, "[w]e find, in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards." Petition No. 76-529, p. 17a. Both the contemporaneous and the subsequent history fully support that conclusion.

2. The decision of the court of appeals upholding EPA's authority and duty to adopt the regulations at issue is entirely consistent with the decisions of this Court and with those of every other court of appeals which has considered the issue.[15] The industry petitioners argue strenuously that three decisions of this Court establish the principle that only those factors specifically enumerated in Section 110 of the Act, 42 U.S.C. 1857c-5, may be required in a state implementation plan and that therefore no provisions governing the prevention of significant deterioration of air quality may be prescribed by EPA.[16] The court below rejected this argument, pointing

(1951). Accord, *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 288 (1956); *NLRB* v. *Fruit and Vegetable Packers*, 377 U.S. 58, 66 (1964).

[15] Four other courts of appeals have expressed their agreement with the Court of Appeals for the District of Columbia Circuit. *NRDC* v. *EPA*, 489 F.2d 390, 408 (C.A. 5, 1974), reversed on other grounds *sub nom. Train* v. *NRDC*, 421 U.S. 60; *Big Rivers Electric Corp.* v. *EPA*, 523 F.2d 16 (C.A. 6, 1975); *NRDC* v. *EPA*, 507 F.2d 905, 913 (C.A. 9, 1974); *Union Electric Co.* v. *EPA*, 515 F.2d 206, 220 (C.A. 8, 1975), affirmed on other grounds, —— U.S. ——, 96 S.Ct. 2518 (1976).

[16] *Train* v. *NRDC*, 421 U.S. 60 (1975), *Hancock* v. *Train*, 96 S.Ct. 2006 U.S. (1976), and *Union Electric Co.* v. *EPA*, —— U.S. ——, 96 S.Ct. 2518.

out that the issues in those cases were entirely different since they concerned what could be required in an implementation plan addressed to cleaning up dirty air rather than what could be required to protect existing clean air. Petition No. 76-529, p. 26a.

Like most of the detailed provisions of the Act, Section 110 was focused primarily on the immediate need to meet the crisis caused by high levels of air pollution in certain areas of the country. Earlier legislation had given primary responsibility to the States to prevent and control pollution, through determining both the air quality standards they would require and the time in which to meet them. See *Train* v. *NRDC*, *supra*, 421 U.S. at 65. However, "the response of the States to these manifestations of increasing concern with air pollution was disappointing. * * * Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970 * * *." *Id.* at 64. The "stick" was a set of explicit requirements—standards, limitations, deadlines and procedures—with which the States had to comply.

Many of these requirements are contained in Section 110. Since these are addressed to the problem of existing pollution, the measures required would necessarily have a heavy impact on existing sources.[17] In view of these potential effects, as well as the fact that less clearly articulated measures had been ineffective, Congress set forth carefully the sorts of restrictions it was mandating.

In contrast, the provision in Section 101(b) requiring the protection of the Nation's existing, relatively clean air resources applies to future pollution and therefore only to future sources which might be introduced into

[17] This Court has referred to the 1970 Amendments as "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution." *Union Electric Co.* v. *Environmental Protection Agency*, *supra*, 96 S.Ct. at 2525.

clean air areas. Congress chose not to set forth detailed measures to control this pollution and left such measures to EPA. Nonetheless, as we have noted, Congress was specifically told by the Administration, that, despite the changes in the Act, it continued its basic protective purpose as to clean air areas. It would be anomalous and illogical to adopt this "stick" in the form of stricter standards and detailed requirements in Section 110 and elsewhere in order to force positive action to clean up the air resources and simultaneously give up the protection of clean air which had existed even under the earlier, less strict statute. There is nothing in the statute or in its legislative history which would support imputing such an inconsistent result to the Congress.

The decisions of this Court cited by the industry petitioners merely hold that the list of requirements in Section 110 of the Act concerning state implementation plans is exclusive in dealing with the problem of cleaning up dirty air. None of these decisions considers the issue of significant deterioration of existing clean air at all. That requirement is based on Section 101(b) of the Act. Once the courts determined that Section 101(b) prohibits significant deterioration, this required, as a matter of the appropriate remedy, that the states include effective provisions to carry out this statutory requirement in their implementation plans. This remedy —of provisions in state implementation plans—has been adopted both by EPA and by the Congress in the legislation passed in both Houses.

3. Some of the industry petitioners claim that the authority given to EPA to protect the nation's air resources is insufficiently defined by the Clean Air Act, and hence constitutes an unconstitutional delegation of legislative power. The basic, oft-repeated rule regarding legislative delegation is contained in *Hampton & Co.* v. *United States*, 276 U.S. 394, 409 (1928):[18]

> If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.

Similarly, in *City of Eastlake* v. *Forest City Enterprises Inc.*, —— U.S. ——, 44 Law Week 4919, 4921 (1976), this Court explained:

> Courts have frequently held in other contexts that a congressional delegation of power to a regulatory entity must be accompanied by discernible standards, so that the delegatee's action can be measured for its fidelity to the legislative will.

There are clearly "an intelligible principle" and "discernible standards" involved in this case. Congress made clear that the principle and standards for measuring EPA's actions were to be the protection of existing clean air.

As we have seen, it was carefully explained to both Houses of Congress during their consideration of the 1970 Amendments that the term "protect * * * the quality of the Nation's air resources" contained in section 101(b) of the Act meant that significant deterioration of existing air quality must be prevented. Indeed, the language of the district court in *Sierra Club* v. *Ruckelshaus* was little more than an elaboration on the administrative interpretation which EPA and its predecessor agency had originally taken. The delegation of congressional power is thus plainly within the limits ap-

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[18] This language was recently cited by this Court as stating the basic test in *FEA* v. *Algonquin SNG Inc.*, —— U.S. ——, 96 S.Ct. 2295 (1976). See also *National Cable Television Assn.* v. *United States*, 415 U.S. 336, 342 (1974).

proved by this Court in *Lichter* v. *United States*, 334 U.S. 742, 785 (1947), quoting from *Hampton*: "Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. 'They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear.'"

4. Some of the industry petitioners urge that the regulations are improper in that they infringe upon the powers of the States in violation of the Tenth Amendment to the Constitution. It is well established that the regulation of air pollution is within the power of the federal government under the commerce clause of the Constitution. See Petition No. 76-529, p. 48a and cases cited at note 77. This court has recently stated (*National League of Cities* v. *Usery*, —— U.S. ——, 96 S. Ct. 2465, 2468 (1976)):

> It is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress.

Thus the regulations are valid unless they violate some specific prohibition of the Constitution. One such prohibition is stated in the *Usery* decision, *supra*, 96 S.Ct. at 2475: "Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." Such an incursion on state functions is plainly absent here.

The regulations, in fact, require nothing of the States. If the States take no positive action, the review of new polluting sources which is necessary to ensure that the applicable pollution increments are not exceeded will be carried out by EPA. 40 C.F.R. 52.21(f). If a State chooses to conduct such review, it must request delega-

tion of this power.[19] Similarly, if the State wishes to exercise its powers under the regulations to redesignate lands within its jurisdiction to more or less restrictive increment classifications, it is free to do so providing the procedural steps are followed and the State has the source review power which is necessary to ensure that the applicable increments, whatever they may be, will be met. 40 C.F.R. 52.21(c)(3)(ii), (vi)(a). Until the State chooses to seek and use this power, the clean air areas will remain Class II, a classification "applied to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant." 39 Fed. Reg. 42510.

None of these acts, which the States may, but need not, take, is in any way akin to the "coerced state policing" found offensive in *District of Columbia* v. *Train*, 521 F.2d 971 (C.A. D.C. 1975), certiorari granted, 44 Law Week 3681. Rather, the regulations here fit within the type of action approved by the court of appeals in the *District of Columbia* case (*id.* at 994, note 27):

> The principle at work here is not that the states have an interest in keeping the federal government from regulating * * * but rather that they are to be protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive. Since the federal government acts under its commerce power when it enforces its own regulations * * *, direct federal regulation by definition involves no intrusion on state sovereignty whatsoever.

Similarly, here the federal government can enforce its own regulations.

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[19] Review of new pollution sources is required by Section 110(a)(2)(D), 42 U.S.C. 1857c-5(a)(2)(D), so that the State can determine whether a new source will prevent attainment or maintenance of the national standards. The States therefore have such review mechanisms and procedures already established.

5. The industry petitioners claim that the regulations are arbitrary and capricious on a variety of grounds. We submit that none of these arguments represents a substantial claim.

The regulations establish a reasonable system of protecting existing clean air by setting certain limits on the additional pollution which may be emitted into that air in the future.[20] The congressional mandate to protect clean air unlike the national standards relating to existing pollutants, is not related to specific, known, quantified adverse effects. The prevention of significant deterioration is a policy of prudence for the future, enacted in the light of an awareness of likely, and even known but unquantified, adverse effects on human health, animals, vegetation, materials, and visibility, which are caused by air pollution at low levels.[21] In setting the

[20] Intervenor respondents submit, however, that the regulations fail to comply with the Clean Air Act insofar as they (1) allow the establishment of Class III areas, where any increase in pollution is permitted as long as the national standards are not exceeded, and (2) fail to control pollution by four of the six regulated pollutants. See Petition, No. 76-617.

[21] Expert testimony before the Congress for several years prior to passage of the 1970 Amendments had emphasized that there is no threshold level below which air pollution is not harmful to health. For example, Dr. G. Hoyt Whipple of the University of Michigan testified in 1968 that threshold levels are merely a convenience so that "one can sleep nights" but that "most threshold levels are, from a scientific point of view, artifacts of the limits of measuring techniques or of the experimental design." Hearings on Air Quality Criteria, 90th Cong., 2d Sess. 598 (1968). Similarly, Dr. John Middleton, Commissioner of the National Air Pollution Control Administration pointed out that "to identify a no-known effects level is something that would be, in my opinion, not only extremely difficult but very likely not possible." Hearings on Air Pollution before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 91st Cong., 2d Sess. 1489 (1970).

Reflecting these warnings, the Senate report on the 1970 Act admitted that "a great deal of basic research will be needed to determine the long-term air quality goals which are required to

Class I and II increments, EPA has adopted a system which can accommodate both the desire for maximum retention of clean air and the need to allow for additional industrial growth.

The extent to which this system carries out the purpose of the Congress is amply demonstrated by the fact that the 1976 amendments adopted by the House and the Senate, while differing in some details, are both patterned directly on the EPA regulations and adopt an increment and classification system. In the case of the Senate bill, S. 3219, the identical Class I and II increments of EPA were adopted. The House version, H.R. 10498, chose an increment system based on percentages of the national standards, but the resulting figures were virtually the same as the EPA increments for Class I and II. Thus, Congress clearly approved the increment

protect the public health and welfare from any potential effects of air pollution." S. Rep. No. 1196, 91st Cong., 2d Sess. 11. In explaining the need for Section 103(f) of the Act, which provides for special emphasis on research on air pollution effects, the report pointed out that, while there is enough knowledge of acute effects to develop standards, "our knowledge of some of the chronic effects involving extended exposure over a period of years is limited." S. Rep. No. 1196, *supra*, p. 7. Senator Muskie later explained that the "standards as set under the 1970 act were conceived of as possible threshold standards. It was more a hope than a certainty." Hearings on Implementation of Transportation Controls before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 93d Cong., 1st Sess. 225 (1973).

This concern with protecting public health from presently unquantified adverse effects is expressed again in H. Rep. No. 1175, 94th Cong., 2d Sess. 85 (1976), which states that

> the need to prevent significant deterioration in so-called "clean air areas" arises in substantial part from the need to protect the public's health. * * * [I]t is * * * clear that a combination of ambient standards with a policy for prevention of significant deterioration of air quality is necessary to provide for maximum feasible protection of the public health. * * * The margins of safety, purportedly ensured by the standards, seem to have vanished in the face of new data.

and classification system as an appropriate method for carrying out the protection of clean air.

6. The industry petitioners also challenge the power granted by the regulations to federal land managers [22] and Indian tribes to adopt a stricter air quality classification as to lands over which they exercise jurisdiction.[23] We submit that the ability of federal land managers and Indian tribes to control air quality in such lands as national parks and forests and Indian reservations is an appropriate, even necessary, adjunct of their general authority to preserve those areas. Moreover, this redesignation power is quite limited. The regulations provide for an elaborate, detailed process for redesignation, including public hearing and extensive consultation with any governmental or other groups which might be affected. 40 C.F.R. 52.21(c)(3)(iv), (v). In addition, any redesignation must be reviewed and approved by the Administrator of EPA, at which time protests may be made. 40 C.F.R. 52.21(c)(vi). These procedures ensure that redesignations will not take place arbitrarily or without careful consideration of the potential effects.

7. Finally, some of the industry petitioners urge that this Court should review the decision below on the ground that new hearings were not held in every State prior to the promulgation of the regulations. As the court of appeals pointed out, every State held hearings prior to adoption of their implementation plans. Petition No. 76-529, p. 43a. Many, if not most, of these hearings included discussion of a need to prevent significant deterioration of existing clean air. When, however, the

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[22] The federal land manager is defined as "the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands." 40 C.F.R. 52.21(b)(3).

[23] Indian tribes are also given the authority to designate a less strict classification. 40 C.F.R. 52.21(c)(3)(v).

individual state plans adopted pursuant to these hearings failed to implement that purpose effectively, they were disapproved by the Administrator in accordance with the order of the district court in *Sierra Club* v. *Ruckelshaus, supra.* 37 Fed. Reg. 23836. Since Section 110 of the Act only requires hearings prior to submission of the implementation plan, the court below correctly concluded that there was no requirement to hold a new set of hearings in each State. Petition, No. 76-529, p. 43a.

In the course of developing regulations which would carry out this purpose, EPA held five regional hearings and received numerous written comments. 39 Fed. Reg. 31000. Further written comments were received and considered after the draft regulations were issued in August 1974. See 39 Fed. Reg. 42510. All interested persons had full and repeated opportunity at all stages of the adoption of the implementation plans to present their views. None of the petitioners made any objection to EPA that it should be holding hearings in every State. It is clear, as the court below pointed out, that there is no claim of harm to any party by this procedure, (Petition, No. 76-529, p. 44a), nor was any objection to it raised. There is therefore no ground for invalidating these regulations. Consequently, even if petitioners were correct that a second set of hearings was required in every state, they are not entitled to use this issue where they failed to complain to the Administrator at a time when a deficiency could have been corrected. *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1951).

CONCLUSION

In short, the decision below is not in conflict with decisions of this Court or any court of appeals. The issues raised by the industry petitioners are not substantial and do not warrant review by this Court. For the foregoing reasons, intervenor respondents submit that the petitions for writs of certiorari filed by the industry petitioners should be denied.[24]

Respectfully submitted,

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[24] On the other hand, the petition filed by the Sierra Club, No. 76-617, raised an important question of federal law which has not been decided by this Court—whether the Environmental Protection Agency has properly complied with its statutory obligation under the Clean Air Act to prevent the significant deterioration of air quality.